Office-Supreme Court, U.S.
FILED
JUN 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1824

In the Supreme Court of the United States

OCTOBER TERM, 1980

LATROBE STEEL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner's production and maintenance employees are represented by the United Steelworkers of America, AFL-CIO. When petitioner and the Union met to negotiate a new collective bargaining agreement in 1977, petitioner introduced two professional stenographers and advised the Union that the stenographers would record the negotiations and that no off-the-record discussions would be permitted (Pet. App. 36a-37a, 39a-40a). The Union objected to the procedure, but petitioner refused to yield and the Union proceeded with negotiations under protest. The Union continued to protest the use of the stenographers throughout the negotiations (Pet. App. 41a-42a, 46a). The Board, relying on its decision in *Bartlett-Collins Co.*, 237 N.L.R.B. 770 (1978), enforced, 639 F. 2d 652 (10th Cir. 1981), petition for cert. pending, No. 80-1662 (filed Apr. 1, 1981), affirmed the

finding of an administrative law judge that petitioner "violated Sec. 8(a)(5) of the Act by preconditioning bargaining upon the presence of a court reporter * * *" (Pet. App. 31a n.1).

2. The court of appeals upheld the Board's conclusion that petitioner had violated the Act by insisting on the presence of stenographers as a precondition to bargaining (Pet. App. 15a-16a).[1] The court recognized (Pet. App. 6a) that in *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), this Court "held that the duty to bargain in good faith is limited to the subjects of wages, hours and terms and conditions of employment" and that "[o]n matters concerning those subjects 'neither party is legally obligated to yield,' " while on "the so-called non-mandatory matters, 'each party is free to bargain or not to bargain, and to agree or not to agree.' " The court, however, "perceive[d] no significant relationship between the presence or absence of a stenographer at negotiating sessions, and the terms or conditions of employment of the employees" (Pet. App. 9a). It added (Pet. App. 9a-10a) that "[i]t would be contrary to the policy of the Act, which mandates negotiation over the substantive provisions of the employer-employee relationship, to permit negotiations to break down over this preliminary procedural issue."

3. The issue raised in the petition—whether a party to collective bargaining negotiations may insist to impasse

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[1] The court of appeals was unanimous in its affirmance of the Board's disposition of the issue raised in the petition. Judge Weis, however, dissented (Pet. App. 22a-25a) from the majority's refusal (Pet. App. 16a-21a) to enforce the Board's findings that petitioner unlawfully had insisted to impasse that the Union's local affiliate be made a signatory to the agreement and that the Union be foreclosed from filing grievances on its own initiative, and its finding of a causal connection between petitioner's insistence on the presence of the stenographers and a strike by bargaining unit employees. No issue concerning these findings is raised before this Court.

upon the use of a stenographer to make a transcript of collective bargaining negotiations—is the same as that presented in *Bartlett-Collins Co.* v. *NLRB*, petition for cert. pending, No. 80-1662 (filed Apr. 1, 1981). Petitioner's assertions (Pet. 11-19) that the Board's decision in this case conflicts with decisions of this Court and those of other courts of appeals are answered, for the most part, in the Board's brief in opposition to the petition in *Bartlett-Collins*.[2]

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[2]A copy of the brief in opposition filed in *Bartlett-Collins* has been served on counsel for petitioner.

The petitioner in *Bartlett-Collins* relied primarily on *NLRB* v. *Southern Transport, Inc.*, 355 F. 2d 978 (8th Cir. 1966), which, as we explained in our brief in opposition in *Bartlett-Collins* (at 8-9 & n.2), is distinguishable on the ground that the court in that case focused on the question whether the demand for a court reporter was made in good faith, and never considered whether the matter constituted a mandatory subject of bargaining. The additional cases relied on by petitioner here (Pet. 7, 17-19) are distinguishable on the same ground. Thus, in *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 139 (1st Cir.), cert. denied, 346 U.S. 887 (1953), the court of appeals stated that it was "not inclined to agree with the Board that the Company's insistence, over the Union's strenuous objection, on having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the Company's bad faith," without even adverting to the question whether stenographic transcription was a mandatory subject of bargaining. Similarly, in *Mid-America Transportation Co.* v. *NLRB*, 325 F. 2d 87, 90 (1963), the Seventh Circuit affirmed the Board's finding of a violation of the duty to bargain in good faith on the ground that the company's "insistence that bargaining take place only in Tennessee * * * was unreasonable and was not advanced in good faith." Finally, in *NLRB* v. *Exchange Parts Co.*, 339 F. 2d 829 (5th Cir. 1965), the court upheld the Board's finding that the company had violated the duty to bargain by failing to meet and confer with the union at reasonable times and intervals concerning negotiation of a contract ("the inherent difficulty arising when a lawyer in full practice represents the employer in bargaining sessions, does not exempt the employer from the normal requirements that nothing be done *for the purpose of stifling an opportunity for discussion*"; 339 F. 2d at 832 (emphasis added)).

That petitioner's insistence on the use of stenographers to transcribe the negotiating sessions may have derived from its good faith belief that such a practice promotes the objectives of collective bargaining (Pet. 6-7)[3] is immaterial, since once an issue is denominated a nonmandatory subject of bargaining, a party may not bargain to impasse on it even in good faith. As this Court explained in *NLRB* v. *Wooster Div. of Borg-Warner Corp., supra,* 356 U.S. at 349:

> "[G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.

See also *NLRB* v. *Katz,* 369 U.S. 736, 742-743 (1962).[4]

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[3]There is a widely-held view contrary to petitioner's, however. In *Bartlett-Collins, supra,* 237 N.L.R.B. at 773 n.9, the Board noted the view of "many experts in the field of labor relations * * * that the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." Similarly, as the Tenth Circuit explained in enforcing the Board's order in *Bartlett-Collins* (639 F. 2d at 656; citations omitted): "It may cause parties to talk for the record rather than to advance toward an agreement. The proceedings may become formalized, sapping the spontaneity and flexibility often necessary to successful negotiations. When a court reporter is demanded over objection, bargaining is likely to begin on a discordant note. The request may give notice that one party lacks confidence in the collective-bargaining process, anticipating litigation rather than agreement. In sum, the process of 'informed persuasion' may be supplanted by the concern for being a careful litigant."

[4]Relying on the court of appeals' dictum (Pet. App. 13a) that "it is equally violative of the Act to insist on the absence of stenographers as to insist that stenographers be present," petitioner asserts (Pet. 17 n.9) that the Board's rule creates a " 'cat and mouse' game * * * so that each party will be able to reject some procedural matter proposed by the other party." As the court noted (Pet. App. 13a n.7), however, if a

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1981

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situation arose in which both parties were found to be frustrating bargaining by insisting to impasse on conflicting positions concerning a nonmandatory subject of bargaining, both would be guilty of engaging in unfair labor practices and the Board would be required to devise an appropriate remedy. The court added (Pet. App. 13a), however, that such is not this case. Here, the Union negotiated in the presence of the stenographer and then filed an unfair labor practice charge. Moreover, as the Board noted (Pet. App. 31a n.1), insistence on a stenographic transcript entails a unique frustration of bargaining negotiations because "impasse on this issue can preclude collective bargaining on any topic whatsoever."

DOJ-1981-06